No. 13509

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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Albert J. Cyr, Warren H. Pillsbury, Deputy Commissioners, United States Department of Labor, Bureau of Employees' Compensation, Thirteenth Compensation District, and William Lasche,

*Appellants,*

*vs.*

Crescent Wharf & Warehouse Company and Pacific Employers Insurance Company,

*Appellees.*

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**Appeal From the United States District Court for the Southern District of California, Southern Division.**

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## BRIEF FOR APPELLANTS CYR AND PILLSBURY.

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**Appeal From the United States District Court for the Southern District of California, Southern Division.**

---

## BRIEF FOR APPELLANTS CYR AND PILLSBURY.

---

### Jurisdictional Statement.

This case arises upon a complaint for judicial review of a compensation order filed pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, U. S. Code, Title 33, Chapter 18, Section 901 *et seq.*

Section 21(b) of the Longshoremen's Act, *supra,* provides:

> "If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part,

> through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred * * *."

Jurisdiction of this court upon appeal is invoked under Section 1291, Title 28, U S. Code.

## Statement of Case.

This is an appeal from an order of the United States District Court for the Southern District of California, Southern Division, Honorable Jacob Weinberger, District Judge, setting aside a compensation order filed May 17, 1951, by Deputy Commissioner Albert J. Cyr, one of the appellants herein in which he awarded compensation to William Lasche who sustained an injury to his left leg on September 6, 1950, in the course of his employment as a longshoreman and who thereafter on November 7, 1950, because of the weakness of said leg sustained an additional injury thereto when said leg gave out while he was standing upon the second or third step of a step ladder in his garage. The liability of the employer was insured by the appellee, Pacific Employers Insurance Company. The said compensation order was issued pursuant to the provisions of the Longshoremen's Act of March 4, 1927, 44 Stat. 1424, 33 U. S. C. A. Section 901 *et seq.*

In the compensation order complained of, the deputy commissioner found the facts in part as follows:

> "That on the 6th day of September, 1950 the claimant above named was in the employ of the employer above named at San Diego Harbor in the State of California in the 13th Compensation District established under the provisions of the Longshoremen's and Har-

bor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by the Pacific Employers Insurance Company; that on said date claimant herein while performing services for the employer as a longshoreman foreman sustained personal injury resulting in his disability when while easing himself down from the top of a hatch he landed on his left foot and suffered a straining injury in the region of the left hip; . . . that as a result of the injury sustained claimant was wholly disabled for 12 intermittent days from the date thereof to and including November 6, 1950; that on the morning of November 7, 1950 while the claimant herein was at home and standing on the 2nd or 3rd step of a stepladder in his garage, he lost control of his injured left leg, falling to the concrete floor of the garage, and shortly thereafter upon being medically examined was found to be suffering from a fracture of the neck of the left femur; that because of the instability of the left leg this second injury is directly attributable to the injury of September 6, 1950." . . .

Without referring to the evidence in detail, it is desired to point out that the evidence was not disputed and showed that after the original injury claimant went to the doctor but changed doctors because his leg was not getting any better; meantime, he was working off and on. Even after the change of doctors there was no response to treatment until about November 1 when there was a lessening of pain and disability [T. 37*]. It was then on November 7, that the injured leg gave way as described in the compensation order above.

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*T. refers to typewritten transcript of hearing before the deputy commissioner.

The court below set aside the award for the disability resulting from the injury of November 7, 1950, upon the ground in substance that the employee's negligence in getting upon the step ladder caused the second injury and therefore that the employee could not recover. The court stated that while the absence of fault or negligence is not a condition precedent to recovery for an injury sustained in the course of employment (see section 4(b) of Longshoremen's Act, 33 U. S. C. A. sec. 904(b) providing that compensation shall be payable *irrespective of fault* as a cause for the injury) this provision does not apply to so-called "consequential" injuries (injuries which result from the weakness of the injured member or similar circumstances) which occur outside the scope of employment.

The present appeal followed.

## Question Involved.

There is but one question or possibly two involved in this case. 1. Whether an employee who has injured a member of his body in the course of employment and who subsequently sustains another injury to that member by reason of its weakened condition is barred from a recovery for the second injury because his carelessness contributed to said injury. 2. Assuming *arguendo* that fault be a factor in the determination of the right to recovery who shall make the determination as to the existence of fault and its relation to the second injury, the deputy commissioner or the reviewing court?

I.

## Fault Is Not a Factor in Compensation Law.

Before entering upon a discussion of this point, it may be helpful briefly to discuss so-called "consequential injuries" and their place in compensation law.

It sometimes happens that an employee who has sustained an injury in the course of employment particularly to some member such as an arm or leg, sustains a subsequent injury to the same member or elsewhere because of the weakness of the injured member. This is called a "consequential injury" because as the name implies it is a consequence of the first injury. A few of the cases involving consequential injuries are *Western Lime and Cement Co. v. Ball,* 217 N. W. 303, 194 Wis. 606 (where as in the instant case the second injury was traceable to and caused by a prior injury from jumping, affecting the thigh muscles); *Continental Casualty Corp. v. Industrial Comm.,* 284 Pac. 313, 75 Utah 220; *Kelly v. Federal Ship and Drydock Co.,* 64 A. 2d 92 (N. J. 1949); *Randolph v. Dupont Co.,* 33 A. 2d 301 (N. J. 1943); *Hall v. Chapman,* 14 N. Y. S. 2d 666, 257 App. Div. 1091 (1939); *Prentice v. Weeks,* 267 N. Y. Supp. 849, 239 App. Div. 227, aff'd. 191 N. E. 538, 264 N. Y. 507 (1934); *Gallagher v. Hudson Coal Co.,* 178 Atl. 161, 117 Pa. Super. 480 (1935). A consequential injury may happen at home or elsewhere. The basis of compensability for the effects of the consequential injury is the causal connection between the consequential injury and the original injury. See Workmen's Compensation Text, 3rd Edition, Volume

6, page 53, by Schneider. It is immaterial whether the original injury was the "proximate cause" of the second injury or the "direct cause" or the "sole cause." No such tests are fixed in the Compensation Act and the courts have uniformly refused to interject them in applying the law to compensation cases. (*Southern Stevedoring Co. v. Henderson,* 175 F. 2d 863 (C. A. 5, 1949); *Manitowoc Boiler Works v. Industrial Commission,* 165 Wis. 592, 163 N. W. 172, 106 A. L. R. 82 (1917); *Hartford Accident and Indemnity Co. v. Cardillo, Deputy Commissioner,* 112 F. 2d 11, 17 (App. D. C. 1940); *Cf.* Morris, *On the Teaching of Legal Cause* (1939), 39 Col. L. Rev. 1087; *Avignone Freres, Inc. v. Cardillo, Deputy Commissioner,* 117 F. 2d 385 (App. D. C. 1940); *Texas Indemnity Co. v. Staggs,* 134 Tex. 318, 134 S. W. 2d 1026 (1940); *Travelers Insurance Company v. Peters,* 14 S. W. 2d 1007 (Tex. 1929); *Cudahy Pkg. Co. v. Parramore,* 263 U. S. 418; *Truck Insurance Exch. v. Industrial Acc. Comm.,* 167 P. 2d 705; *Hanson v. Robitshek,* 209 Minn. 596, 297 N. W. 19 (1941); *N. Y. Central R. R. Co. v. White,* 243 U. S. 188.) A concurring cause is a sufficient cause to establish the right to compensation. (*Southern Stevedoring Co. v. Henderson,* 175 F. 2d 863 (C. A. 5, 1949); *Hampton Roads Stevedoring Co. v. O'Hearne,* 184 F. 2d 76 (C. A. 4, 1950); *Clayton v. Dept. of Labor,* 217 P. 2d 783 (Wash. 1950); *Victor Oolotic Stone Co. v. Crider,* 106 Ind. App. 461, 19 N. E. 2d 478 (1939); *Texas Indemnity Co. v. Staggs,* 134 Tex. 318, 134 S. W. 2d 1026 (1940).) The refinements of

common law concepts as to cause and effect have no place in the administration and application of compensation law. (*Burns S. S. Co. v. Pillsbury,* 175 F. 2d 473 (C. A. 9, 1949); *Cardillo v. Liberty Mutual Ins. Co.,* 330 U. S. 469, 481; *Cf. N. L. R. B. v. Hearst,* 322 U. S. at pages 120, 124, 127, 131. Accord: *O'Leary v. Brown-Pacific-Maxon, Inc.,* 340 U. S. 504.)

Therefore when the court below discusses whether the injury to the employee's leg which resulted from the fall from the ladder was "directly attributable" to the first injury, or whether the second injury was a "proximate and natural result" of the original injury and the principles applicable in "tort law," it was interjecting in compensation law the application of tests and principles which are not in the law and which the cases and authorities which we have cited above have uniformly ruled out.

In addition to all of the above, Section 4(d) of the Compensation Act, 33 U. S. C. A. Section 904(d), provides:

> "compensation shall be payable irrespective of fault as a cause for the injury."

The court below was of the opinion that this provision does not apply to consequential injuries. There is no such restriction in the provision itself; there is no logical reason for eliminating fault as an element with reference to the original injury but not as to the consequences of that injury. To so "interpret" said provision is to interpolate. The provision that compensation shall be payable irre-

spective of fault as a cause of injury is about as broad and sweeping as language could make it. To deny compensation because the injured employee's fault contributed to the injury is to do the very thing which the act interdicts.

We pass over the provision in the Act (Sec. 3(b), 33 U. S. C. A. Sec. 903(b)) which complements Section 4(d) *supra* and provides:

> "No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another."

As this Court and other courts have stated, fault is out "unless it amounts to the kind and degree of misconduct prescribed in definite terms by the Act. It is entirely inconsistent with reading into the statute the law of tort causation and defense, where liability is predicated on fault and nullified by contributory fault." (*Hartford Accident and Indemnity Co. v. Cardillo,* 112 F. 2d 11, 17 (1940), cert. den. 310 U. S. 649. Accord: *Burns S. S. Co. v. Pillsbury,* 175 F. 2d 743 (C. A. 9, 1949).)

The view that contributory fault is out as an element of consideration is supported by decisions under the New York Workmen's Compensation Law, which was adopted almost verbatim in the Longshoremen's Act. Under the usual rules of construction the adoption of a statute generally carries with it the construction placed upon the adopted statute. (See House Report No. 1190, 69th

Congress, 1st Session, p. 2; *L. S. Case v. Pillsbury,* 148 F. 2d 392 (C. A. 9, 1945); *Marshall v. Mahoney,* 56 F. 2d 74 (C. A. 9, 1932); *Hartford Accident & Indemnity Co. v. Hoage,* 85 F. 2d 411 (App. D. C. 1936).)

In *Colvin v. Emmons & Whitehead,* 215 N. Y. Supp. 562, 216 App. Div. 577, which was decided in 1926 (prior to the enactment of the Longshoremen's Act) the question of the materiality of contributory negligence in the determination of liability for a consequential injury was squarely before the court. In that case the injured employee, as in the instant case, fell from a ladder at his home when he was two or three feet from the ground resulting in his injury and death. He had previously been injured at work and was thereafter subject to dizzy spells. The court stated:

> "The Board found that death 'was not naturally and unavoidably the result of the injuries' of December 12, 1917, and also made the following findings: 'Deceased had no business to be performed on the ladder, he was not employed by anybody and in going up on the ladder, he placed himself in a hazardous, unnatural and improper place for a man in his physical condition.' *This latter finding is immaterial and is strongly suggestive that this case has been decided on an improper theory. Indiscreet and negligent it probably was for the deceased to go upon the ladder but indiscretion and negligence constitute no defense.* The question for determination was whether there was causal relationship between the death and the accident of 1917. The statute furnishes the tests for

determining that question. Section 2, subdivision 7, of the Workmen's Compensation Law of 1922 defines 'injury' as meaning an accidental injury 'arising out of and in the course of employment and such disease or infection as may naturally and unavoidably result therefrom' and subdivision 8 of said section defines 'death' as meaning 'only death resulting from such injury.' (See, also, Workmen's Compensation Law of 1914, Sec. 3, subds. 7, 8, as amd. by Laws of 1917, chap. 705.) Within the purview of these definitions the inquiry should have been first whether the vertigo was due to the accident of 1917. If so and it caused the deceased to fall from the ladder his death resulted from an 'injury' 'arising out of and in the course of employment' and causal relation between accident and death existed. It is of course true in a superficial sense that the decedent would not have died had he not gone upon the ladder, but it may be equally true that having gone upon the ladder he would not have fallen had he not been attacked by vertigo due to his original accident. The case should have been considered from the latter standpoint because as already stated *indiscretion, poor judgment and negligence on the part of the employee do not defeat a claim for compensation.*

On the material question in the case the Board has made no finding. It apparently decided the case on the immaterial finding above quoted. The material question was whether the vertigo which concededly caused the deceased to fall was due to the accident of 1917. A specific finding on this important question should have been made. Because of the failure to make such finding the decision must be reversed. (Matter of *Shearer v. Niagara Falls Power Company,* 242 N. Y. 70.) If on another hearing the Board on the evidence shall find that vertigo resulted

> from the accident of 1917 and that vertigo caused deceased to fall from the ladder and lose his life causal relationship between the accident of 1917 and death will be established. All concur. Decision reversed and claim remitted, with costs to the claimant against the employer and the insurance carrier to abide the event." (Emphasis supplied.)

Assuming that Section 4(b) of the Act, 33 U. S. C. A. Section 904(b), providing that compensation shall be payable irrespective of fault would somehow permit a construction that fault may bar the right to compensation, such construction would not be a liberal one which the courts have enjoined should be applied to the administration of the law. (*Baltimore & Philadelphia Steamboat Co. v. Norton, Deputy Commissioner,* 284 U. S. 408 (1932); *Fidelity & Casualty Co. of New York v. Burris,* 61 App. D. C. 228, 59 F. 2d 1042 (1932); *Associated General Contractors of America, Inc. v. Cardillo, Deputy Commissioner,* 70 App. D. C. 303, 106 F. 2d 327 (1939); *De Wald v. Baltimore & O. R. Co.,* 71 F. 2d 810 (C. A. 4, 1934), cert. den. October 8, 1934, 293 U. S. 581. Accord: *Contractors, P. N. A. B. v. Pillsbury,* 150 F. 2d 310 (C. A. 9, 1945).)

Since the deputy commissioner did find in the instant case upon undisputed evidence that the second injury was due to the effects of the first injury the court below should have sustained the award. (*O'Leary v. Brown-Pacific-Maxon, Inc.,* 340 U. S. 504; *Cardillo v. Liberty Mutual Ins. Co.,* 330 U. S. 469.)

## II.

## Assuming Fault to Be an Element, a Finding With Reference Thereto Would Lie With the Deputy Commissioner and Not the Reviewing Court.

The deputy commissioner made no finding with reference to the negligence of the employee in getting upon the ladder. The reviewing court did so. The powers to be exercised by a reviewing court upon judicial review of an award of compensation has frequently been stated to be that which are expressly conferred by the statute. (*Associated Indemnity Corp. v. Marshall, Deputy Commissioner,* 71 F. 2d 235 (C. A. 9, 1934); *Shugard v. Hoage, Deputy Commissioner,* 67 App. D. C. 52, 89 F. 2d 796 (1937); *Luyk v. Hertel,* 242 Mich. 445, 219 N. W. 721 (1928); *Texas Indemnity Ins. Co. v. Pemberton,* 9 S. W. 2d 65 (Tex. 1928); *Nierman v. Industrial Comm.,* 329 Ill. 623, 161 N. E. 115 (1928); *Town of Albion v. Industrial Comm.,* 202 Wis. 15, 231 N. W. 249 (1930); *Joseph W. Greathouse Co. v. Yenowine,* 193 S. W. 2d 758 (Ky. 1946); *Bassett, Deputy Commissioner v. Massman Construction Company,* 120 F. 2d 230 (C. A. 8, 1941), cert. den. 62 S. Ct. 92.) If there was an absence of a finding upon a material fact (whether the injured employee was negligent and whether such negligence contributed to or caused the second injury) the proper procedure would have been to remand the case to the deputy commissioner for that purpose. (*Colvin v. Emmons, supra,* 215 N. Y. Supp. 562, 216 App. Div. 577; *Hillcone S. S. Co. v. Steffen,* 136 F. 2d 965 (C. A. 9, 1943).) The reviewing court has no authority to make new and independent findings. (*Marshall v. Pletz,* 317 U. S. 383, 388.) If the question of contributory negligence is material the deputy commissioner would be the proper person to determine in

the first instance whether an employee with an injured leg who was able to work at longshore work except at certain heavy assignments [T. 9, 11] was negligent in getting upon the second or third step of the ladder. Incidentally, the finding of the court below that "claimant had difficulty in walking and used the support of a cane; that on November 6, 1950 [the day before the second injury] the claimant refused work because of the condition of his leg" is somewhat misleading in that it leaves the impression that at the time of the second injury claimant used a cane. There is no evidence in the record to show that claimant used a cane after he returned to work following the first injury. Claimant returned to work on September 25, 1950, and worked intermittently thereafter [see Ex. A, T. 27]. It is unlikely he could do longshore work with a cane. The refusal of work on November 6, 1950, was for the same reason as the refusal on September 26 and 27; October 10, 14, 20, 23, 28, 29 and 31 [see Ex. A, T. 27], namely, that after his return to work following the first injury, claimant had to refuse certain work, which was beyond his capacity in his condition [T. 9, 11].

## Conclusion.

In view of the above it is respectfully submitted that the deputy commissioner's finding to the effect that claimant's injury on November 7, 1950, was attributable to the injury of September 6, 1950 (the deputy commissioner found that it was "directly" attributable; there is no such requirement and the adverb may be regarded as surplus-

age) is supported by evidence and under the authorities should be sustained. (*O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U. S. 504.) The order of the court below setting aside the award was improper and should be reversed.

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